

FOREIGN SERVICE GRIEVANCE BOARD

2013 ANNUAL REPORT

RECIPIENTS: Committee on Foreign Relations
 United States Senate

 Committee on Foreign Affairs
 United States House of Representatives

 Director General of the Foreign Service
 United States Department of State

February 2014

The Board's Organization and Operations

I am privileged to present the Annual Report of the Foreign Service Grievance Board (FSGB) for calendar year 2013. As in previous years, the Report summarizes the operations of the Board during 2013 and is submitted pursuant to Section 2205(f) of the Foreign Service Act (22 U.S.C. §4135(f)). The Report includes a brief narrative regarding the most significant operations of the Board during the year as well as a brief description of the grievances decided during 2013, including the number, types and disposition of the cases.

The Board continues to function in accordance with its statutory authorization as the sole, independent grievance appeals forum of the Foreign Service. The majority of cases before the Board are appeals from agency grievance decisions. The Board deals with the foreign affairs agencies within our jurisdiction,¹ the American Foreign Service Association (AFSA), the exclusive bargaining unit for the Foreign Service, private attorneys who represent certain grievants, and the public. Although grievances come to the Board as appeals, the Board considers the evidence *de novo* and bases its decisions on the Record of Proceedings (ROP) that includes all materials received or obtained by the Board in a case with the exception of materials deemed to be irrelevant, immaterial or unduly repetitive.

Members of the FSGB are selected from two groups. One is composed of experienced, dedicated retired Foreign Service Officers (FSOs) from the various foreign affairs agencies. The second group is comprised of attorneys, judges, and other legal professionals who have extensive experience in labor relations and employment matters. Historically, the Board has utilized three-member panels for deciding grievance appeals, including grievances involving hearings that are statutorily mandated to include three members. The panels are typically comprised of a presiding member selected from the labor law professionals and two members from the Foreign Service. Although the Chairperson of the Board has statutory authority to select the panel members for each

¹ Agencies within the Board's jurisdiction include the Departments of State, Commerce and Agriculture, the U.S. Agency for International Development, the U.S. Peace Corps (separation for cause cases only), and the Broadcasting Board of Governors.

grievance, the Chair has in practice delegated that authority to the Board's Executive Secretary, who acts in consultation with the Deputy Chair. The combination of expertise and talent brought to the panels by integrating the labor law experts, who have had significant experience arbitrating, litigating and deciding personnel disputes, with experienced Foreign Service members, provides a balance of perspectives on both the facts and the law that has proven beneficial. The panel chairs are able to provide advice on the legal and regulatory framework that the Board needs in order to adjudicate a wide variety of issues; the Foreign Service members often inform the process with understanding and experience of the Foreign Service culture and its unique international components.

In dealing with internal operations as well as with the parties to a grievance, the Board operates through both in-person and virtual interactions. Typically, members do their research, deliberations, and decision writing from their own homes or offices based on pre-determined case timelines. The Board utilizes various methods to facilitate its review of the Record of Proceedings (ROP) and reach its decisions. When necessary, pre-hearing or status conferences, and hearings themselves, are facilitated by live interactions between the panels, grievants, AFSA, the agencies and their representatives through a video-conferencing system located at Board headquarters.

Garber A. Davidson has served as Chairman of the Board since October 1, 2011, and was reappointed to serve until October 2015. He is an attorney and former Senior Foreign Service Officer with the U.S. Agency for International Development (USAID). Elliot Shaller, an attorney and professional arbitrator and mediator of labor and employment disputes, has been a member of the Board since October 2009 and has served as Deputy Chair since October 2011.

Mark Johnsen, a Foreign Service Officer with over 20 years of State Department Service as a Management Officer in both overseas and domestic assignments, currently serves as the Board's Executive Secretary. Mr. Johnsen has served as Executive Secretary since March 2013 and will remain with the Board until August 2015.

Gail Lecce, a former Deputy Chairperson of the Board, has served as the Board's Appeals Counsel since October 2011 and assists the Chair, Deputy Chair and panels with legal research and analysis when requested. She also develops research folders on specific legal and regulatory issues that facilitate independent research by Board members, and assists with training of new members in accessing FSGB and related research materials both on the Board's website and in its headquarters office.

The Board has two Special Assistants who provide indispensable support to panels that are selected to decide specific grievances. Their work involves a range of activities including compiling and organizing the Records of Proceedings; arranging panel telephone conferences; working with the panel chairs to monitor case timelines; providing technical and logistical support for members' research and drafting; arranging the logistics for hearings at the Board; and liaising with AFSA, private attorneys and the parties to maintain case timelines and explain and enforce the Board's policies and procedures, thus ensuring the integrity of the entire appeal process. Lisa Bucher, a law graduate and Foreign Service Officer with extensive experience in political affairs, joined the staff in September 2013. Joseph Pastic, a retired USAID Foreign Service Officer, has been with the Board since July 2003. Jeremiah A. Collins, a partner with the law firm of Bredhoff & Kaiser, continues to serve as outside counsel to the Board.

The Board has one Foreign Service Office Management Specialist on its staff, Marie Willadsen, who has served in various overseas posts, the most recent being Amman, Jordan where she served as the Management Officer's OMS. Elena Cahoon, who is a member of the Civil Service, has served the Board since 1999 and functions as a receptionist and secretary for the Board.

The Board has maintained its membership total of about 20 members for the past several years. The breakdown between Foreign Service and outside labor experts remains at 13 FSOs and 7 labor experts.

The Board had the following members in 2013:

Garber A. Davidson (Chairperson)
Elliot H. Shaller (Deputy Chairperson)
Bernadette M. Allen
James E. Blanford
Frank J. Coulter (resigned October 2013)
Barbara C. Cummings
Lois E. Hartman
Alfred O. Haynes, Jr. (deceased April 2013)
Kevin F. Herbert (resigned October 2013)
Arthur A. Horowitz
William J. Hudson
Margaret E. Keeton
Warren R. King
Cheryl M. Long
Gregory D. Loose
J. Robert Manzanares
William B. Nance
William E. Persina
Harlan F. Rosacker
Jeanne L. Schulz
Nancy M. Serpa
John M. Vittone
Susan R. Winfield

Most of the members live in the Washington, D.C. area, and Board meetings are held quarterly in the headquarters office in Arlington, Virginia. Members from time to time use the Board's office for reviewing ROPs and for holding panel meetings and status conferences, as well as full hearings. While the Board decides the majority of grievances on the record without oral testimony, it holds hearings in separation for cause proceedings (unless waived by the charged employee), as mandated by law. It also holds hearings at the grievant's request in disciplinary cases as well as separations for expiration of Time in Class or relative performance. The Board in its discretion may order a hearing when in its judgment a grievance can best be resolved by presentation of oral testimony and argument, although it rarely does so.

The Board made significant progress in relation to internal procedures and technical advances during 2013. Our major project was establishing a new website. The website is the mechanism by which both Board members and the public access and

research Board decisions, although the public has access only to redacted versions of the decisions. As noted in the 2012 Annual Report, the FSGB website was in poor condition due to the volume of documents, the age of the original software, and the obsolete nature of its design, and the Board had not been able to upload new decisions reliably for the past several years.

The Board entered into an agreement in early 2013 with the Department of State's Information Resource Management (IRM) team to convert the FSGB website from its existing software platform to the Department's Microsoft SharePoint standard. In the course of this upgrade, the IRM team decided to create two separate webpages, one for public access (www.fsgb.gov) and one for official Board business that is accessible only through the Department's OpenNet system. Both websites went live in October, and currently all members have established OpenNet accounts that permit remote access to the system.

The completion of the new websites has enabled the FSGB to update its information on line more rapidly and with greater ease and security, as well as limit the amount of paper records. All documents filed in a case are now distributed to panels electronically through the website, ensuring a much higher level of protection of sensitive information. Gaps in the decisions available to the public that occurred while the old website was dysfunctional and the new website was being established have now been filled for the most part, although the Board is undertaking a rigorous review to ensure that its database is complete. Links to other sources are also more easily added to the new website, making critical information about the grievance process more accessible to grievants and their attorneys, as well as to Board members. Feedback from users of the new websites has been generally positive. Continuing progress in this area is heavily reliant upon FSGB staff and members acquiring the training and expertise needed to realize the potential of technological developments, as the FSGB does not have in-house IT staff.

A new Records Disposition Schedule that required approval of the Department of State as well as the U.S. National Archives was also proposed and finally approved

during the year. The prior schedule had not been updated for many years and required the Board to retain voluminous paper records that were no longer considered necessary. The new schedule will enable the Board to dispose of these unnecessary files, maintain its files more efficiently, and utilize reclaimed space in its headquarters office for additional meeting and conference purposes.

The Board continually tries to issue its decisions and orders in a timely way and is aware of the need of individual grievants, the agencies, and AFSA to receive results without unwarranted delay. In 2012 we managed to reduce the average number of weeks from filing to resolution or issuance of a decision from 41 (the previous year) to 33 weeks. This year the average time from filing to issuance of the decision was 43 weeks.

Much of the time for disposition of cases is in the hands of the parties. For example, if discovery is lengthy, the parties file multiple motions, or they enter into settlement negotiations that may or may not bear fruit, the time taken to resolve a case may become protracted. This year there were also several events outside the Board's control that impeded our efforts to issue decisions in accord with our planned timelines. Two Board members, including one of our panel chairs, became seriously ill and required lengthy periods of leave for recovery. One of our members died. A new contract registration process required of all members, in itself complicated, was delayed significantly for new members as well as some current members due to the government shut-down, preventing them from working for a period of time. Lastly, although the new website offers many advantages, particularly in terms of the protection of documents containing sensitive information, implementation has required members to devote administrative time this year to learning how to navigate the new, unfamiliar system through OpenNet. These factors, as well as the fact that several grievances filed with the Board were unusually complex and contentious, contributed to a lengthier resolution time this year than last.

We are taking steps to address issues within our control and improve the turn-around time for grievance decisions. For example, the Board's Special Assistants are working closely with the panel chairs to insure that internal drafting deadlines are

adhered to, and where there is slippage, that remedial actions are taken; the Board's Appeals Counsel is working with panels to expedite research and other legal assistance where needed; and the Executive Secretary and the Office Management Specialist have been working closely with Board members to address the technical challenges associated with the adoption of the new website. The Chair and Deputy Chair are fully committed to improving resolution time and will continue to bring to bear all appropriate resources to do so.

During 2013 the Board continued its practice of inviting concerned outside groups to participate in the context of its quarterly meetings as a means of broadening understanding of grievance procedures both within the agencies and vis-à-vis the Board. The Office of Inspector General for the Department of State and the unit within the Department's Human Resources bureau that handles performance and evaluations (HR/PE) made presentations and entertained discussion from Board members on a variety of issues. AFSA, the exclusive bargaining unit of the Foreign Service, was present and participated in the meetings as well. (Discussion of specific cases decided by the Board, or cases pending or which may potentially be filed with the Board, was deemed off limits during these presentations.) The concept was widely supported by the membership, and it was decided that the Board would again invite similar groups from the foreign affairs agencies and from AFSA to continue the dialogue.

2013 Caseload

Fifty-four new cases were filed with the Board in 2013, a significant drop from the numbers in 2012 and 2011 (74 and 70), but commensurate with the two years previous to that (56 in 2010 and 43 in 2009). Forty-six cases were filed by officers of the Department of State; six by employees of USAID; one by an employee of the Department of Commerce; and one by an employee of the Department of Agriculture.

The Board resolved seventy-three cases in 2013, comparable with the number of appeals resolved in 2012 (69). The number of cases settled and withdrawn (23 in 2013

compared to 20 in 2012) and the number dismissed for lack of timeliness or jurisdiction (7 in 2013 compared to 8 in 2012) were also similar to the prior year's figures. As stated above, on average the Board took 43 weeks from the time a case was filed to issue a decision, an increase over last year. Three cases were particularly difficult for the panels to decide. Factoring out those three cases, the average time from filing to disposition was 39 weeks.

Although many of the cases fell within the routine types of grievances and disciplinary actions, there were a number of cases both filed and resolved this year that were significantly complex, involving unique and sometimes controversial circumstances and issues of law. The Board addressed its first case involving the hacking of an officer's private email account, an area in which both the law and Department policy are rapidly evolving as security in use of the Internet becomes an issue of national importance.

The Board also addressed two cases in which senior post officers challenged the accuracy of critical Inspector's Evaluation Reports (IERs) prepared by the Department's Inspector General's Office during routine post reviews. The Board recognized the importance of these reports in assisting Department management to identify serious deficiencies in the performance of senior officers, whose supervisors are often physically distant. However, it also recognized the need to balance that management requirement with the potentially career-altering effect that a negative report, based on anonymous sources and taken only as a "snapshot" at the time of the inspection, can have on a senior employee.

The Board has one case currently before it stemming from the attack on the consulate in Benghazi, in which the employee asserts that his rights were violated within the highly political context of the attack's aftermath. Another pending case involves a claim that a Report of Investigation was improperly done, inaccurate, and falsely prejudicial, and thus should be expunged from the grievant's security file. Although the Board has addressed similar expunction issues a number of times in the past, it remains a controversial subject.

Although the numbers are small, the Board has also seen an uptick in cases involving employee access to consular databases. Media attention to these issues has increased over the past several years, and State Department policy and regulations have evolved. Different types of databases present different levels of vulnerability and involve varying practices within the Department, which requires the Board to analyze the factual and regulatory circumstances in each case carefully.

Of a more mundane nature but highly important to employees, the Board addressed a number of cases this year involving claims by employees that disciplinary charges were brought too late to allow them a fair opportunity to address the charges. Again, the Board recognized in its decisions the need to balance the agencies' need to impose discipline with the employees' need to be able to fairly and expeditiously address charges that can have an extremely detrimental effect on their careers.

In a handful of the more complex cases, either the agency or the employee has asked for reconsideration of the Board's decision, requiring a second, sometimes extensive, round of deliberations.

Board Decisions in 2013

Separation

The Board decided 10 cases in 2013 involving the proposed separation of an employee. Two cases involved separation for cause; three involved recommendations for separation by the Department of State Performance Standards Board for failure to meet the standards of the class; three involved employees who were not granted tenure; and in one case the employee was being involuntarily retired for failing to be promoted within the Time in Class limitations. An additional case involved a request for reconsideration filed by an employee who was separated in 2002.

Three of the cases were ultimately settled and withdrawn. In three cases, the Board affirmed the agency decision to separate. The Board reversed the agency in two

cases, finding in one that the agency had taken into account factors of which the employee had not been notified, and absent those factors, separation could not be sustained. In the second case, the Board found that statements in an EER of an untenured employee were falsely prejudicial and inaccurate, and it directed reconsideration by the tenure boards. The Board dismissed the last two cases. It found in one that the acting official who recommended separation lacked the authority to do so. The agency refiled when the official was named to his position permanently, and the refiled case is pending before the Board. The Board dismissed the second case when the untenured grievant failed to pursue the action after the Board decided against granting him interim relief from separation.

Discipline

Discipline cases comprised the greatest number of cases decided by the Board during the past year – 21 in total. There were a number of different charges alleged, based on a variety of circumstances, including: notoriously disgraceful conduct; improper personal conduct; poor judgment; nepotism; failure to follow regulations/instructions; making inappropriate and threatening remarks; absence without leave; failure to cooperate in an official inquiry; and lack of candor.

In several cases, the employee admitted the underlying facts, but contested the penalty or contended that the agency had failed to take into account mitigating factors. Seven of the cases were ultimately settled and withdrawn or dismissed. The Board affirmed the agency decision, including the penalty, in six cases. In three cases, it affirmed the agency decision but reduced the penalty. In one case, it partially affirmed the decision, but found several of the specifications charged to be untimely. In only one case did the Board fully reverse the agency decision, finding that proposing to discipline an employee more than three years after the charged behavior, with no satisfactory reason for the delay, violated the Department's regulatory requirement that, "[d]isciplinary procedures will be carried out in a fair, timely, and equitable manner."

EER/OPF/IER

The Board decided 20 cases involving the Official Performance File (OPF) and underlying documents during the past year. The cases covered the range of claims frequently presented to the Board: falsely prejudicial statements; late submissions; poor drafting of the EER, leading to a criticism letter issued to the rater; criticisms in EERs not supported by examples; lack of counseling and time for grievant to improve; and lack of a plan for the employee's improvement when performance was unsatisfactory. The alleged procedural error in several of the cases led to low rankings. In one unusual case, a construction manager challenged a statement in his EER assigning him fault for allowing foreign nationals without clearances to work in secure areas of a new embassy under construction.

In two cases, principal officers at posts challenged the accuracy of Inspector's Evaluation Reports (IERs) that were significantly more negative than their EERs. The officer prevailed in one case; the Board found that there were substantial portions of the IER that were unbalanced and falsely prejudicial and ordered that the IER be expunged from the officer's file. In the other case, the Board found that the IER was substantially accurate and ordered that only one statement be redacted.

Nine of the cases were eventually withdrawn by the grievants, eight because they were settled. The agency decision was fully reversed in only two cases, including the IER case. In the other reversal, the Board found that the Area for Improvement section in two of the employee's EERs, on which two low rankings were partially based, were not intended as criticisms, but rather guidance for the future. In six cases, the Board affirmed the agency decisions. In three cases, the Board affirmed parts of the agency decisions, but found in favor of the grievants on some claims.

Financial

The Board decided 11 cases involving financial claims, affirming the agency decision in six of the cases and reversing the agency in two. Two cases were withdrawn – one settled, and one taken instead before the Civilian Board of Contract Appeals

(CBCA), and a third was dismissed for failure to state a valid grievance. The cases involved a variety of issues: timing of the rollover of overtime payments earned in Pakistan; overweight shipment charges; property damage to household goods during shipment; locality payments during training; per diem payments during house hunting trips; reimbursement of annuity and survivor benefit overpayments; and entry level salary. In two cases out of the ordinary, the Board affirmed the agency decision where several years after the fact employees were asked to repay the costs of Foreign Service dependents' overnight field trips incorrectly funded as part of their overseas education allowances.

Assignments

Four cases decided by the Board this year involved claims disputing assignments. The Board affirmed the agency decision in three cases. The first involved an assignment by State/MED in which the grievant challenged the agency's practices in curtailing her from one post and assigning her to a different position. The Board found that although the State/MED assignment practices differed somewhat from those in other parts of the Department, they were transparent and fair. The second case involved a claim that the grievant should have received an assignment given to another person. The Board found that the assignment complied with Department regulations. In the third case, the grievant challenged an involuntary curtailment and assignment to overcomplement status. The fourth case, involving a down-stretch assignment, was dismissed by the Board for lack of timeliness and failure to state a valid claim.

Other

The Board decided seven cases that did not fall into any of the above categories, affirming the agency decision in two and dismissing two. The remaining three were settled and withdrawn.

The Board affirmed a decision in which the grievant claimed he was instructed not to attend a public celebration of his 50th birthday in retaliation for his having filed a grievance previously. The Board found no evidence of retaliation. The second case

affirmed involved a Family Member Appointment in which the grievant claimed that she had been improperly prevented from taking a position as retaliation by post management against her husband, an FSO. The nature of the case changed mid-way when it was revealed in discovery that there were security concerns of which the grievant had not been apprised.

The Board dismissed one case where it found grievant's claims to be untimely. The grievant claimed that the Department had improperly denied her a TIC extension offered under the Iraq Service Recognition Package. In the second case dismissed, the grievant had challenged the Department's action in withholding a promotion for one year based on his probationary security clearance status. When the year passed and the promotion was granted, the Board dismissed the case as moot, but without prejudice to AFSA's right to file a grievance on behalf of other, similarly situated employees.

In two of the cases settled and withdrawn, the grievants challenged the adequacy and fairness of their supervision. The third involved implementation of remedies granted by the Board to the grievant in an earlier grievance.

Judicial Actions Involving Board Rulings

During the past year, the federal courts considered cases related to three prior Board appeals.

As noted in last year's annual report, the plaintiffs in *Richard Lubow, et al., v. United States Department of State, et al.*, 923 F. Supp. 2d 28 (D.D.C. 2013) were five Diplomatic Security agents who served in Iraq in 2004. They grieved the Department's application of a cap on their premium pay and its decision not to grant them a waiver of repayment of the amounts that the Department had paid them in excess of that cap. On appeal, the Board found that the Department had appropriately considered relevant factors and had not abused its discretion in denying the waivers. The District Court for the District of Columbia affirmed the Board's decision and granted summary judgment in

favor of the Department. Grievants then requested that the court stay repayment of the debts pending their appeal of its decision. In *Richard Lubow, et al., v. United States Department of State, et al.*, 934 F. Supp. 2d 311 (D.D.C. 2013), the court denied the request.

In *William E. Shea v. John F. Kerry, U.S. Department of State*, 2013 U.S. Dist. LEXIS 66686 (D.D.C. 2013), the District Court for the District of Columbia brought closure to a case that had been pending before it since 2002. The plaintiff was a white Foreign Service officer who was hired as an entry-level officer in 1992. At that time, the Department had in place a mid-level affirmative action program for minorities. Shea filed a grievance in 2001 claiming that the program resulted in reverse discrimination in violation of Title VII. On appeal to the FSGB, the Board dismissed Shea's claims for lack of jurisdiction. Shea then filed suit in district court. The district court twice entered final judgments. Both times the court of appeals reversed the district court and remanded the case for further consideration.

Judge Lamberth, the fourth judge to be assigned the case, found that under the standard set by the *Supreme Court in Johnson v. Transportation Agency*, 480 U.S. 616 (1987), the defendant Department of State met its burden of showing that the affirmative action plan was justified by a manifest imbalance in the workforce and was properly tailored to achieve the Department's remedial goals, and that Shea failed to overcome the Department's evidence. The court granted the Department summary judgment and dismissed the case with prejudice.

The District Court for the Northern District of Illinois, Eastern Division, twice considered a suit brought by John Erwin under the Freedom of Information Act (FOIA) during the past year. *John Erwin v. United States Department of State*, 2013 U.S. Dist. LEXIS 30170 (N.D. Ill. 2013) and 2013 U.S. Dist. LEXIS 172597 (N.D. Ill. 2013). Erwin separated from the Foreign Service in 2003. He filed two grievances with the Department of State, both of which were appealed to the FSGB. His FOIA claims, which were not a direct appeal of the Board decision, sought to compel the Department to turn over additional documents in response to a FOIA request. The Department sought

summary judgment, contending that it had complied with the law in its search and release of documents to Erwin. In its first ruling, the court found that the Department had not established the adequacy of its search for responsive documents nor sufficiently justified exemptions from disclosure that it claimed. The Department corrected these flaws in a refiling, and the court granted its request in its second ruling.

Respectfully submitted this 27th day of February, 2014.

Garber A. Davidson
Chairperson
Foreign Service Grievance Board

Attachment: Annual Report 2013 - Statistics

Annual Report 2013 – Statistics

A.	Total cases filed	54
B.	Types filed:	
	EER/OPF	17
	Financial	8
	Disability	0
	Discipline	11
	Separation	8
	Assignment	2
	Implementation Dispute	0
	Other	8
C.	Total cases resolved	73
D.	Types resolved:	
	EER/OPF	20
	Financial	11
	Disability	0
	Discipline	21
	Separation	10
	Assignment	4
	Implementation Dispute	0
	Other	7
E.	Dispositions of cases resolved in 2013:	
	Agency Decision Affirmed	26
	Agency Decision Reversed	7
	Partially Affirmed/Partially Reversed	10
	Settled/Withdrawn	23
	Dismissed	7
F.	Oral hearings	1 (2 days)
G.	Mediations	0
H.	Grants of interim relief	27
I.	Average time for disposition of a case, from time of filing to Board decision, withdrawal, or dismissal, was 43 weeks.	
J.	There were 48 cases pending before the Board as of December 31, 2013.	